FEATURED POST

In fact, the Israeli settlements were never illegal

The old effort to legitimize Palestinian claims to the land with a false historical account erases Jews' right to their ancestral terroritory won in a modern defensive war

The West Bank city of Ariel. (Yossi Zamir/Flash 90/File)

In reversing the Obama administration's shameful acceding to the UN Security Council's 2016 resolution that Israeli settlements in Judea and Samaria were illegal under international law, US Secretary of State Mike Pompeo finally stated what was obvious to many legal scholars and others who have assessed the facts on the ground; namely, as Pompeo put it, "The establishment of Israeli civilian settlements in the West Bank is not per se inconsistent with international law." Additionally, as he noted, while the decision "does not prejudice or decide legal conclusions regarding situations in any other parts of the world," the secretary emphasized that the affirmation of the settlements' legality "is based on the unique facts, history, and circumstances presented by the establishment of civilian settlements in the West Bank."

Those "unique facts, history, and circumstances," of course, have existed for some time now, but were ignored or purposely contorted to promote a defective diplomacy in which, it was thought, the realization of Palestinian statehood was being compromised by the construction of Jewish housing in the West Bank. The settlement debate had also been hijacked by the Arab world and its

Western apologists who, willingly blind to history, international law, and fact, continued to assign the blame for the absence of peace on the perceived offenses of occupation and Israeli truculence. Thus, for instance, then-Secretary Hillary Clinton and her predecessor, Condoleezza Rice, had both referred to the nuisance Israel caused by letting Jews live in the West Bank, against the wishes of the Palestinians who view that territory as once and forever theirs, as "unhelpful" in seeking a viable solution to Palestinian statehood.

What was truly "unhelpful," however, were the repeated references to the West Bank and Gaza, as well as East Jerusalem, as "Arab" land, the putative Palestinian state in waiting, encumbered only by Israeli oppression, the dreaded occupation, and those pesky settlers. This widely held notion that European Jews, with no connection to historic Palestine, colonized Arab land and displaced the indigenous Palestinian population, of course, is a key part of what Professor Richard Landes of Boston University defined as the "cognitive war" against Israel; it serves the perverse purpose of validating Arab territorial rights to the West Bank and Gaza, and, more importantly, casts Israelis as squatters who have unlawfully expropriated land that is not — and never was — theirs.

Secretary Pompeo's confirmation of the legality of the settlements serves to reverse the faulty historical assumptions and misreading of law that has animated the settlement debate, principally the fact that not only all of the land that is current-day Israel, but also Gaza and the West Bank, is part of the land granted to the Jews as part of the League of Nations Palestine Mandate, which recognized the right of the Jewish people to "close settlement" in a portion of those territories gained after the breakup of the Ottoman Empire after World War I. According to Eugene V. Rostow, the late legal scholar and one of the authors of UN Security Council Resolution 242 written after the 1967 war to outline peace negotiations, "the Jewish right of settlement in Palestine west of the Jordan River, that is, in Israel, the West Bank, Jerusalem, and the Gaza Strip,

was made unassailable. That right has never been terminated and cannot be terminated except by a recognized peace between Israel and its neighbors," something which Israel's intransigent Arab neighbors have never seemed prepared to do.

Moreover, Rostow contended, "the Jewish right of settlement in the West Bank is conferred by the same provisions of the Mandate under which Jews settled in Haifa, Tel Aviv, and Jerusalem before the State of Israel was created," and "the Jewish right of settlement in the area is equivalent in every way to the right of the existing Palestinian population to live there."

The Six Day War of 1967, in which Israel recaptured Gaza and the West Bank, including Jerusalem, resulted in Israel being cast in another perfidious role — in addition to colonial usurper of Arab land, the Jewish state became a brutal "occupier" of Arab Palestine, lands to which the Jews presumably had no right and now occupied, in the opinion of many in the international community, illegally.

But when did the West Bank, Gaza, and East Jerusalem become Palestinian land? The answer is: never. In fact, when Israel acquired the West Bank and Gaza and other territories in 1967 after being attacked by Egypt, Syria, and Jordan, the Jewish state gained legally recognized title to those areas. In Israel's 1948 War of Independence, Egypt, it will be recalled, illegally annexed Gaza at the same time Jordan illegally annexed the West Bank — actions that were not recognized by most of the international community as legitimate in establishing their respective sovereignties. Israel's recapture of those territories in 1967, noted Professor Stephen Schwebel, State Department legal advisor and later the President of the International Court of Justice in The Hague, made the Jewish state what is referred to as the High Contracting Party of those territories, both because they were acquired in a defensive, not aggressive, war, and because they were part of the original Mandate and not previously under the sovereignty of any other High Contracting Party. "Where the prior holder of

territory had seized that territory unlawfully," Schwebel wrote, referring to Jordan and Egypt, "the state which subsequently takes that territory in the lawful exercise of self-defense has, against that prior holder, better title."

It is also morally repellent, for those arguing on the Palestinian side, that the West Bank, like Gaza, eventually be made judenrein, totally absent of Jews, that, as Mahmoud Abbas has loudly announced on more than one occasion, the future Palestinian state would not have one Jew living within its borders. Putting aside the fact that it is Israel that is continually derided for being racist and exclusionary (despite having one million Arab citizens), only in a world turned upside down would diplomats uphold a principle that Jews — and only Jews — not be allowed to live in certain territories, and particularly those areas to which they have irrevocable and inalterable biblical, historic, and legal claims.

In fact, Professor Emeritus Jerold Auerbach of Wellesley College has written that, protests from the State Department and many in the West aside, "Israeli settlement throughout the West Bank is explicitly protected by international agreements dating from the World War I era, subsequently reaffirmed after World War II, and never revoked since . . . The [Mandate for Palestine] recognized 'the historical connection of the Jewish people with Palestine' and 'the grounds for reconstituting their national home in that country' . . . This was not framed as a gift to the Jewish people; rather, based on recognition of historical rights reaching back into antiquity, it was their entitlement."

While those seeking Palestinian statehood conveniently overlook the legal rights Jews still enjoy to enable them to occupy *all* areas of historic Palestine, they have also used another oft-cited, but defective, argument in accusing Israel of violating international law by maintaining settlements in the West Bank: that since the Six Day War, Israel has conducted a "belligerent occupation." But as Professor Julius Stone discussed in his book, *Israel and Palestine*, the fact that the West Bank and Gaza were acquired by Israel in a "sovereignty vacuum," that

is, that there was an absence of High Contracting Party with legal claim to the areas, means that, in this instance, the definition of a belligerent occupant in invalid. "There are solid grounds in international law for denying any sovereign title to Jordan in the West Bank," Stone wrote, "and therefore any rights as reversioner state under the law of belligerent occupation." So, significantly, the absence of any sovereignty on territories acquired in a defensive war — as was the case in the Six Day War of 1967 — means the absence of what can legally be called an occupation by Israel of the West Bank, belligerent or otherwise.

The matter of Israel violating Article 49 of the Fourth Geneva Convention is one that has been used regularly, and disingenuously, as part of the cognitive war by those wishing to criminalize the settlement of Jews in the West Bank and demonize Israel for behavior in violation of international law. It asserts that in allowing its citizens to move into occupied territories Israel violates Article 49, which stipulates that "the occupying Power shall not deport or transfer parts of its own civilian population into territory it occupies."

The use of this particular Geneva Convention seems particularly grotesque in the case of Israel, since it was crafted after World War II specifically to prevent a repetition of the actions of the Nazis in cleansing Germany of its own Jewish citizens and deporting them to Nazi-occupied countries for slave labor or extermination. Clearly, the intent of the Convention was to prevent belligerents from forcibly moving their citizens to other territories, for malignant purposes — something completely different than the Israel government allowing its citizens to willingly relocate and settle in territories without any current sovereignty, to which Jews have longstanding legal claim, and, whether or not the area may become a future Palestinian state, should certainly be a place where a person could live, even if he or she is a Jew. And does anyone doubt that once the Palestinians, aided and abetted by mendacious Western elites, diplomats, and an anti-Israel international community of supporters, have purged Gaza, the West Bank, and East Jerusalem of all Jews, that new calls will

then arise accusing Jews of "occupying" more "Arab" lands in Tel Aviv, Netanya, Tiberias, or Haifa?

Professor Rostow himself saw through the disingenuous talk about legal rights and resolutions when it came to the issue of the settlements. The discussion was not, in his mind, "about legal rights but about the political will to override legal rights." In fact, the settlement debate is part of the decades-old narrative created by the Palestinians and their Western enablers to write a false historical account that legitimizes Palestinian claims while air-brushing away Jewish history. "Throughout Israel's occupation," Rostow observed, "the Arab countries, helped by the United States, have pushed to keep Jews out of the territories, so that at a convenient moment, or in a peace negotiation, the claim that the West Bank is 'Arab' territory could be made more plausible."

With Secretary Pompeo's bold statement reversing the legal status of the settlements, at least for the time being, that "convenient moment" may be less likely to occur and at least one key element in the cognitive war against Israel seems to have neutralized.

ABOUT THE AUTHOR

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